No. 07-4764

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce a Board Order issued against the International Brotherhood of Electrical Workers, Local 98 ("the Union"). The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the

Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over the case under Section 10(e) of the Act (29 U.S.C. §160(e)), the unfair labor practices having occurred in Pennsylvania.

The Board's Decision and Order issued on August 31, 2007, and is reported at 350 NLRB No. 83. (A .)[1] That Order is final under Section 10(e) of the Act. The Board filed its application for enforcement on December 20, 2007. The Board's application was timely filed; the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's findings that the Union violated Section 8(b)(1)(A) of the Act by blocking an employee from entering a jobsite in order to perform a work task.

2. Whether the Board acted within its broad remedial discretion in issuing a broad cease-and-desist order.

STATEMENT OF THE CASE

Acting on charges filed by TRI-M Group LLC ("the Company"), the Board's General Counsel issued a complaint alleging that the Union violated Section 8(b)(1)(A) of the Act. Following a hearing, an administrative law judge

[1] "A" references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

found merit to the General Counsel's allegations and issued a decision and recommended order (A 219-37), to which the Union excepted. The Board issued a decision affirming the judge's findings and adopting his recommended order. (A .)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

In April 2006, the Union began picketing against the Company at a jobsite in Philadelphia, where the Company, a non-union employer, was performing electrical work as a subcontractor on a nursing home renovation project. (D&O 2; A 22-23, 47-49, 63, 109.) The Union initially conducted picketing every day, but after several weeks the Union limited its picketing to Fridays between 7:00 a.m. and 2:00 p.m. During these hours, the Union placed two pickets, with signs explaining the dispute, at the two entrances to the site's parking lot. (D&O 2; Tr 22-23, 109-111, 125.) The eastern-most entrance to the parking lot was fronted by a short concrete sidewalk running along the adjacent street, Edison Avenue. The sidewalk dead-ended to a stand of woods and a creek, where, in April 2006, the project's general contractor placed three large dumpsters end-to-end. (D&O 2; Tr 42, 50, 52.)

On Friday, June 17, 2006, Union Representative Ray Della Vella was overseeing picketing at the work site. Della Vella followed his regular routine by

placing two union pickets at the eastern entrance to the parking lot, and by notifying the local authorities that the Union planned to picket the site that day. The Philadelphia police department responded by sending two civil affairs officers to the site to observe the picketing. (D&O 2; Tr 112, 136.)

At around 1:00 p.m., Company employee Sean Muth drove a backhoe out of the eastern parking lot entrance with the intention of depositing a load of construction debris into one of the dumpsters on Edison Avenue. (D&O 3; Tr 43, 91-92.) As Muth turned onto the avenue and faced the dumpsters, Della Vella and the two pickets moved from the parking lot entrance to the dumpster, effectively blocking Muth's path. They refused to move as he approached with the backhoe. (D&O 4; Tr 56, 92-95, 101-03.)

Supervisor Joseph Prego, observing that the pickets would not let Muth proceed to the dumpster, walked over and instructed Muth to return the backhoe to the parking lot so as not to impede traffic while Prego sorted out the problem. (D&O 4; Tr 54-55, 57, 96.) As Muth returned to the parking lot, Prego called the general contractor's job superintendent, Steve Herman. Herman immediately went to the east entrance and instructed Prego to block traffic, and ordered Muth to attempt to dump the load once again. Herman explained to the pickets that they needed to dump waste into the dumpster, and asked if they were going to move.

Della Vella, who was talking on his cell phone, told the civil affairs officers, "tell him to shut up!" Della Vella then walked over to the two pickets and stood next to them, once again blocking Muth's progress to the dumpster. (D&O 4; Tr 68-69.)

Herman then approached the civil affairs officers and said, "Well, I guess they're not going to move." One of the police officers responded by directing the picketers to move and directing Muth to drive forward, but when Muth did, the pickets, who were standing approximately three feet in front of the dumpster, again refused to move. (D&O 4; Tr 70-72.) After several more minutes, Della Vella told the picketers to allow Muth to pass. One of the civil affairs officers again told Muth to proceed, and this time Muth was able to drive to one of the dumpsters and deposit the waste in it. (D&O 4; Tr 45-46, 73, 99.) In all, the picketers delayed Muth for approximately 30 minutes. (D&O 4; Tr 100.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Members Kirsanow and Walsh), in agreement with the administrative law judge, found that the Union violated Section 8(b)(1)(A) of the Act when Della Vella and two union pickets denied employee Muth egress to a jobsite to perform his task of dumping construction debris from his backhoe into a dumpster. (A .)

The Board determined that because the Union had demonstrated a "proclivity" to violate the Act, a broad cease-and-desist is necessary to remedy the Union's violation. Thus, the Board's Order requires the Union to cease and desist from restraining or coercing employees of the Company "or of any other employer," by blocking them from entering a jobsite or performing a work task, or "in any other manner restraining or coercing employees of [the Company] or any other employer, in the exercise of the rights guaranteed them by Section 7 of the Act." (D&O 10.) Finally, the Board's Order also requires the Union to post a remedial notice.

STATEMENT OF RELATED CASES

This case has not previously been before this Court and Board counsel is not aware of any related case pending before this or any other court. As will be discussed below concerning the appropriateness of the Board's broad remedial order, this Court has recently enforced the Board's finding in another case that the Union has engaged in similar unlawful activity.[2]

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[2] *Local 98, IBEW*, 342 NLRB 740 (2004); *enf'd NLRB v. International Broth. of Elec. Workers*, 06-4124, 251 Fed.Appx. 101 (3rd Cir. 2007) (Not selected for publication).

STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

When reviewing the Board's determination in a particular case, this Court must "accept the Board's factual determinations and reasonable inferences derived from [those] determinations if they are supported by substantial evidence."[3] This Court therefore cannot "substitute [its] view of the record even if [it] would have reached different conclusions on *de novo* review."[4]

"The Board's credibility determinations in particular merit great deference."[5] This is because the administrative law judge "sees the witnesses and hears them testify," while the Court looks "only at cold records."[6] Accordingly, the Board's "findings should be given great deference, particularly when they are based on demeanor testimony . . . ."[7]

Section 10(c) of the Act (29 U.S.C. § 160(c)) empowers the Board to issue an order requiring a labor law violator to cease and desist from the violations found

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[3] *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 175 (3d Cir. 2002). *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 304 U.S. 474, 487-88 (1951).

[4] *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 151 (3d Cir. 1994) (citing *Universal Camera*, 340 U.S. at 488).

[5] *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1177 (3d Cir. 1989).

[6] *ABC Trans-National Transport, Inc. v. NLRB*, 642 F.2d 675, 684 (3d Cir. 1981) (citation omitted).

[7] *Id.* at 686.

and "to take such affirmative action . . . as will effectuate the policies" of the Act. This statutory command "vest[s] in the [Board] the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review."[8]

The standard of review for Board remedial orders is abuse of discretion; thus, a Board order should not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."[9]

SUMMARY OF ARGUMENT

With complete disregard for the Act, the Union once again has engaged in unlawful activity by preventing employees from gaining access to their worksite. Substantial evidence supports the Board's finding that Union representative Dell Vella and two union picketers blocked employee Muth from approaching a Company dumpster in order to complete a work assignment.

The Union argues that the Board erred in finding the violation because Muth's testimony should not have been credited, the entire incident took only 5

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[8] *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). *Accord St. John's Gen. Hosp. of Allegheny v. NLRB*, 825 F.2d 740, 746 (3d Cir. 1987).

[9] *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215-16 (1964) (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)).

minutes rather than 30 minutes as found by the administrative law judge, and the pickets stood their ground in front to the dumpsters because they thought that Muth was trying to interfere with their right to picket. None of these arguments have merit.

Similarly, the Union fails to show that the Board abused its discretion in ordering a broad cease-and-desist remedy. The Board based its broad order on the Union's proclivity to violate the Act, which was demonstrated through a decade-long history of unlawful conduct by the Union generally and, in some cases, by the very same union representative as involved here. The Union now would have the Court look the other way and refuse to enforce the Board's Order because its most recent prior violation occurred more than 4 years ago. However, the Board is not required to ignore a history of prior violations simply because several years have elapsed, particularly where, as here, those prior violations were widespread, egregious, and even included physical violence.

Further, the Company ignores the fact that, more recently, this Court entered a consent order in a contempt proceeding brought by the Board against the Union and Union Representative Della Vella. Despite all the Board orders and the recent contempt order, the Union here proceeded to violate the Act yet again, *even in the presence of police officers*. Under all of these circumstances, the Board very

reasonably concluded that the Union's demonstrated disregard for the Act, time and again, spanning nearly a decade, fully warranted the issuance of a broad order.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY BLOCKING AN EMPLOYEE FROM ENTERING A JOBSITE IN ORDER TO PERFORM A WORK TASK

Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A)) provides in pertinent part that: "[i]t shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7. . . ."[10] Employees have a Section 7 right to cross a picket line and report for work. A union's interference with that right violates Section 8(b)(1)(A).[11] Accordingly, "[i]t is well settled that picketing which interferes with or blocks the ingress and egress of employees and others at a place of employment,

[10] Section 7 of the Act (29 U.S.C. § 157) gives employees the following rights:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . . .

[11] *Sheet Metal Workers*, 154 F.3d at 140, 143 n.10; *Local 542, Operating Eng'rs*, 328 F.2d at 852-53.

or which, in effect, forces employees to 'run a gauntlet,' is inherently coercive and in contravention of the Act."[12]

The Board here reasonably found that the Union violated Section 8(b)(1)(A) by infringing on Muth's Section 7 right to refrain from assisting the Union and to perform work by blocking his access to the dumpster.[13] As the credited evidence amply demonstrates, when Muth attempted to drive a debris-laden backhoe to the dumpsters, his progress was impeded by Della Vella and the two picketers, who placed themselves between Muth and the dumpster he was driving towards. Della Vella and the picketers thereby temporarily prevented Muth from performing his assigned work task. Indeed, Muth was instructed by his supervisor to return to the parking lot, where he had to wait while his supervisor and the police prevailed upon Della Vella and the picketers to allow him to pass.

The Union makes three challenges to the Board's finding that it had violated the Act. First, it argues (Br 9-10) that the administrative law judge erred by crediting the testimony of employee Muth over that of Della Vella. Second, it

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[12] *United Mine Workers*, 429 F.2d at 146.

[13] *See NLRB v. Sheet Metal Workers' Int'l Assoc., Local Union No. 19*, 154 F.3d 137, 140, 143 n.10 (3d Cir. 1998) (finding violation of 8(b)(1)(A) where a union blocked access to a jobsite); *Gen. Maint. Serv. Co.*, 329 NLRB 638, 685 (1999) ("nonviolent conduct, including efforts to prevent employees from reporting to work by impeding access to an employer's facility," violates Section 8(b)(1)(A)).

argues that the entire incident lasted only 5 minutes and therefore was de minimus. Finally, it argues that the picketers refused to move because they believed that Muth and his backhoe were attempting to interfere with their protected activity. All of these arguments are utterly without merit.

First, as to the Union's challenge to the judge's credibility resolution, the Union identifies no basis to the Court to justify taking the extraordinary step of overturning the judge's crediting of Muth's testimony, and in fact no such basis exists. As the judge explained, he was most impressed by Muth's calm and dispassionate manner, which indicated to him "a sense of (Muth's) fundamental neutrality in this dispute." [14] (D&O 3.)

The judge further supported his credibility determination by finding that Union Representative Della Vella's version of events, which contradicted Muth's version, simply "defied logic." (D&O 3.) For example, the judge noted that Della Vella insisted that the two pickets had stationed themselves by the dumpster the entire time, and had not suddenly moved between Muth and the dumpster, as Muth claimed. However, because the dumpsters were far removed from the actual gate, the judge found it impossible "to believe that the Union would choose the

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[14] *See, e.g., NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 526 n.14 (3d Cir. 1977) (court will not overturn judge's credibility resolutions where he has explained them).

dumpster as a primary locus for its pickets." (D&O 3.) As the judge reasoned, if the Union was intent on gaining the greatest access to the passing public – not just those people passing by, as the Union claims, but also those slowing down to enter the site – then the gate would be the obvious place to station picketers.[15] Thus, the administrative law judge concluded, Muth's version of events was more reliable than Della Vella's.

The Company argues (Br 9), however, that as a 15-year employee of the Company, Muth could hardly be considered neutral. However, merely being a long-time employee does not make an employee pro-management. The Union points to no evidence in the record indicating that Muth opposed union representation or harbored any anti-union animus. Therefore, the Union's mere assertion that Muth was not neutral fails to undermine the judge's determination that Muth was a credible witness, and falls far short of the high burden of proof required to overturn his reasonable credibility determination.

Second, the Union challenges (Br 11-15) the judge's conclusion that the incident lasted approximately 30 minutes. Specifically, pointing to the police

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[15] Because the evidence supports the judge's finding that the pickets moved from the gate to the dumpster in order to impeded Muth's progress with the backhoe, the judge did not have to determine whether a violation would still have occurred if the picketers had already been stationed at the dumpsters and simply refused to move in order to allow Muth access to the dumpster site to complete his work assignment.

records indicating that only 5 minutes had elapsed, the Union claims that the blockage was too short in duration to amount to a violation. This argument lacks merit as well.

None of the testimonial evidence support the Union's argument. As the judge noted (D&O 4), Muth testified that the incident took approximately 30-35 minutes.[16] (Tr 100.) Similarly, supervisor Prego testified that it took 15-20 minutes (Tr 46), and the general contractor's job superintendent, Herman, estimated that it took approximately 20 minutes. (Tr 80.) Even Union witness Della Vella testified that it took at least 10 minutes. (Tr 119.) Thus, contrary to the Union, the testimony consistently shows that the incident took far more than 5 minutes.

Further, as the judge noted (D&O 5 n.14), the police report notation that the incident took only 5 minutes must have referred only to Muth's final delivery attempt, and not the entire sequence of events, including Muth's failed first attempt and his return to the parking lot. Such a conclusion is the only reasonable one; the Union does not dispute that Muth tried and failed to approach the dumpster, that he

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[16] The Union claims (Br 11-12) that Muth should not be credited on this point because the stress of operating a backhoe prevents him from having a reliable recollection of the time lapse. However, as a 15-year employee of the Company, Muth would not likely feel stressed by performing a presumably routine job assignment.

was ordered to return to the parking lot, and that after a confrontation involving Della Vella, the pickets, Herman, Prego, and the police, Muth was waved on for a second, successful attempt. It is inconceivable that all this could have transpired in just 5 minutes.

Finally, contrary to the Union (Br 13-15), impeding an employee's access to a work site can be a violation even if it lasts only a few minutes.[17] Thus, even if the entire incident lasted only 5 minutes, the judge's conclusion here was still reasonable and appropriate, and fully supported by substantial evidence.

The Union next challenges the Board's findings by asserting that the picketing had taken place for weeks without incident, and that Della Vella – who claimed that he had never before seen the Company use a backhoe to move debris – believed that Muth was attempting to interfere with peaceful picketing when he drove the backhoe towards the picketers. Presumably, the Union is arguing that the picketers stood their ground in the belief that they were defending their right to picket against an aggressive attack.

This argument is preposterous. Although it is possible that an employee driving a backhoe loaded with debris towards a dumpster had a motive other than

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[17] *See Shopmen's Local Union No. 43 (Stokvis Multi-Ton Corp.)*, 243 NLRB 340, 346 (1979) (pickets refusing to allow truck to exit facility for several minutes acted unlawfully because "blocking an entrance or an exit even for a short period of time constitutes restraint and coercion within the meaning of the Act").

simply doing his job, it is far more reasonable to conclude that Muth simply intended to dump garbage into the dumpster. The Union's claim that Della Vella had never before seen company employees use a backhoe in this manner is similarly ridiculous; even if it was the Company's first use of the backhoe to move trash, the Company was under no obligation to clear its work schedule, or mode of moving garbage, with the Union before going about its business. Della Vella's unfamiliarity with the Company's practices is no excuse for its failure to allow Muth access to the dumpster work area.

Thus, the Company has failed to rebut the Board's well-supported finding that it had blocked employee Muth from accessing a worksite in order to perform a job function, and that the Union had thereby violated Section 8(b)(1)(A) of the Act.

II. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN ISSUING A BROAD CEASE-AND-DESIST ORDER

A. The Board Did Not Abuse Its Discretion In Issuing a Broad Remedial Order In Light of the Union's Proclivity To Violate the Act and Its Decade-Long Disregard of the Act

The Board's statutory mandate expressly allows the Board to issue a remedial "order requiring such person [as committed the unfair labor practice] to cease and desist from the unfair labor practice" and to take other affirmative action to effectuate the policies of the Act. 29 U.S.C. § 160(c). Where a union has

demonstrated a proclivity to violate the Act, the Board acts within its discretion in issuing a "broad" remedial order – that is, one not limited to the parties or the particular dispute involved in the case before it.[18] Such orders constitute an appropriate means of protecting "other employees [and employers] . . . exposed to the same type of pressure through other comparable channels."[19]

In fashioning broad orders, "the Board reviews the totality of circumstances to ascertain whether the respondent's specific unlawful conduct manifests 'an attitude of opposition to the purposes of the Act to protect the rights of employees generally,' which would provide an objective basis for enjoining a reasonably anticipated future threat to any of those Section 7 rights."[20] Courts have long upheld such broad remedial orders.[21]

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[18] *Hickmott Foods*, 242 NLRB 1357, 1357 (1979) (holding that broad orders are warranted where a party has "engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights").

[19] *Electrical Workers Local 501 v. NLRB*, 341 U.S. 694, 705-06 (1951).

[20] *Five Star Mfg.*, 348 NLRB No. 94 (2006).

[21] *See, e.g. Federated Logistics & Operations v. NLRB*, 400 F.3d 920 (D.C. Cir. 2005); *NLRB v. G & T Terminal Packing Co., Inc.*, 246 F.3d 103 (2d Cir 2001); *NLRB v. Windsor Castle Health Care Facilities, Inc.*, 13 F.3d 619, 624 (2d Cir. 1994); *NLRB v. So-Lo Foods, Inc.*, 985 F.2d 123, 126 n.4 (4th Cir. 1993); *Coil-A.C.C., Inc. v. NLRB*, 712 F.2d 1074, 1076 (6th Cir. 1983).

1. The Union's history of violating the Act fully warranted the Board in ordering a broad remedy

Having found that the Union had violated the Act as alleged, the judge here was tasked with determining whether a broad remedial order was warranted, as urged by the Board's General Counsel. (D&O 5.) After concluding that the Union's actions in the instant case alone did not warrant issuance of a broad order (D&O 6), the judge, in accordance with established law, then considered the Union's past violations of the Act to determine whether a broad order would otherwise be appropriate.

The pattern of unlawful activity that the judge considered began over a decade ago, in 1996, when the Board's General Counsel filed a series of complaints alleging that the Union had engaged in various unfair labor practices, including blocking employees' ingress to certain worksites. In 1997, this Court enforced a stipulated agreement settling those cases, in which the Union agreed to cease blocking employees' ingress to their work sites. (GCX 3.)

Despite that Court-enforced agreement, 3 months later, the Union violated the Act again by physically assaulting employers, pushing employees, and destroying employer property within sight of the employees, all in violation of Section 8(b)(1)(a) of the Act. The Union's actions in that case, which also included unlawful picketing, work stoppages, and threats, prompted an

administrative law judge to conclude that the Union had "demonstrate[ed its] proclivity for violating the Act and its general disregard for the fundamental rights of employees and neutral employers."[22] Accordingly, the judge issued a broad cease-and-desist order. ("*The Telephone Man.*")[23]

Undeterred, the Union again violated the Act just a few months later, and this time, Union representative Della Vella was involved. There, the Board found that during the course of several months in the spring and summer of 1999, Della Vella threatened to block ingress or egress to a worksite, and union picketers blocked employee egress to a worksite by preventing an employee from dumping waste into a dumpster – precisely the kind of violation at issue in the instant matter. ("*MCF Services.*")[24] (D&O 5, n 15.)

These violations, following so closely on the heels of the Union's earlier unlawful conduct, compelled the Board to observe that the Union "has not changed its ways."[25] Thus, the Board concluded, "[the Union] has, by its conduct herein, demonstrated a deliberate and near contemptuous disregard for the Board's

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[22] *Int'l Bhd. of Elec. Workers, Local 98 (The Telephone Man)*, 327 NLRB 593, 602 (1999)

[23] *Id.* at 602-03.

[24] *IBEW Local 98 (MCF Services)*, 342 NLRB 740 (2004).

[25] *Id.* at 763.

processes and remedial orders."[26] Observing the Union's proclivity to violate the Act, the Board concluded that the Union had developed "a general disregard for the fundamental rights of employees and neutral employers."[27] Accordingly, the Board issued a broad remedial order against the Union, ordering it to cease and desist, not only from the unfair labor practices found, but also from "[i]n any other manner" interfering with employees' statutory rights and from coercing "any other employer."

Less than one year later, in January and February 2000, the Union, acting again through its representative Della Vella, further violated the Act in an unlawful attempt to obtain certain work. Although that case involved a somewhat different violation than the one involved in the instant case, the Board there recognized and summarized the obvious pattern of unlawful activity established by the Union, and issued a broad cease-and-desist order against the Union. ("*Swartley Bros.*")[28]

The Board, having already issued a broad cease-and-desist order against the Union in *The Telephone Man*, responded to the Union's new round of unlawful activity in *Swartley Bros*. by pursuing civil contempt charges against the Union.

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[26] *Id.*

[27] *Id*.

[28] *Electrical Workers Local 98 (Swartley Bros. Engineers*), 337 NLRB 1270, 1273 and n.7 (2002).

On September 16, 2003, this Court entered a consent order against the Union which contained several extraordinary provisions aimed at remedying the Union's demonstrated contempt for the Act. (D&O 7; CPX 1.) Notably, the order fined Della Vella $5,000 for his role in the unlawful activity, payable to the Board and not to be reimbursed to Della Vella by the Union. The order further required the Union to post a remedial notice signed by union officials, and by Della Vella separately. Finally, the order required the Union to convene a special meeting of its business agents, organizers, and officials, at which it was to read the notice aloud.

As the contempt proceedings were underway, the Board also sought enforcement before this Court of its decision and order against the Union in *MCF Services*. This Court enforced that order on October 12, 2007.[29]

In sum, during the better part of the past decade – and apart from the Union's unlawful actions in the instant matter – the Union was found by the Board to have committed widespread violations of the Act in four separate cases, requiring the Board to issue a broad cease-and-desist remedial order and to obtain a consent order in civil contempt proceedings. The violations involved a broad range of unlawful actions, from activity almost identical to the unlawful actions

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[29] *NLRB v. Int'l Bhd of Elec. Workers*, 06-4124, 251 Fed.Appx. 101 (3rd Cir. Oct 12, 2007) (Not selected for publication).

found herein, to others involving threats and violence against different employers and employees.

It is completely reasonable to assume, as the Board here did, that this "dismal record of misconduct" (D&O 8) will continue unless strong pressure is brought to bear on the Union to force its compliance with the law. Thus, the need for a broad remedial order against the Union here is manifest. Unless broadly enjoined, the Union it will find other ways to interfere with employee rights in future disputes with nonunion employers or future organizing campaigns.[30] The Union's conduct is exactly the type of ongoing and widespread conduct that broad orders are designed to remedy.[31] Moreover, Della Vella's repeated involvement in unlawful activity – despite prior Board orders, entry of contempt orders, *and even the ongoing presence of police officers onsite here* – demonstrates both the Union's overall disregard of its responsibilities under the Act and the likelihood of future violations. (D&O 9.)

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[30] *See Sheet Metal Workers*, 154 F.3d at 139, 143 n.10 (enforcing broad order where union threatened employees seeking access to jobsites and picketed at jobsite gates reserved for use by neutral employers); *NLRB v. Highway Truckdrivers & Helpers Local No. 107*, 300 F.2d 317, 322 (3d Cir. 1962) (enforcing broad order where union threatened employees of secondary employers, obstructed an entrance and exit from a freight terminal, and induced and encouraged employees of neutral employers to refuse to do business with a secondary employer).

[31] *Hickmott*, 242 NLRB at 1357.

Accordingly, the Board's issuance of a broad remedial order – its second against the Union – was a proper exercise of its statutory discretion to fashion appropriate remedies for the violation it found.

2. The Union's arguments lack merit

The Union argues that the Board erred in ordering a broad cease-and-desist remedy because the evidence failed to demonstrate that the Union had a proclivity to violate the Act or had demonstrated a disregard for employee rights. Specifically, the Union argues that many of the prior instances of unlawful activity relied on by the judge involved different types of violations than the one involved here, or were too remote in time to justify a broad order. These arguments are meritless.

The Union first argues (Br 16-17) that the Board erred in considering *Swartley Bros*., its most recent unlawful activity prior to the events herein, because that case involved a violation of a different section of the Act than that involved here. This argument ignores the fact that the Board did not rely on *Swartley Bros*. alone to support the issuance of a broad order; rather, the Board considered other cases involving precisely the same kind of violation that is at issue here, such as *MCF Services*. Moreover, rather than support the Union's position, the fact that the Union had, in the past, committed not just the same violation that is at issue

here, but a number of other violations as well, only serves to bolster the Board's conclusion that the Union has demonstrated an ongoing proclivity to disregard the Act.

The Union then argues that the Board erred in relying on *MCF Services* in finding a proclivity to violate the Act, because that violation – the one most similar to the offense committed by the Union herein – occurred more than 4 years before Della Vella and his picketers blocked Muth's egress to the dumpster. However, contrary to the Union's contention (Br 17) there is no rule of law stating that conduct older than 4 years may not be considered when determining whether a broad order is appropriate. Indeed, the Board here expressly rejected that view, holding that it would "assess the totality of the circumstances in each case, including the applicable dates of misconduct and prior Board and court orders, to determine whether a broad order is warranted." (D&O 1 n.2.) Thus, there is no date after which the slate is wiped clean of a party's past violations.

Moreover, the Union ignores the fact that this Court had entered a consent order in a contempt proceeding brought by the Board against the Union in September 2003, little more than 2 years before the events in this case took place. That contempt order is of great significance here, as the judge acknowledged. (D&O 7-8.) The entire reason for entry of a contempt order is to impress upon a

party in the very strongest manner possible the need for compliance with the law. And yet, the actions of the Union as a whole, and Della Vella personally, in the instant matter clearly show that they have failed to take that message to heart.

In sum, by urging the Court to disregard many of its violations, the Union would have the Court ignore its the clear pattern of unlawful activity. However, the facts speak for themselves: in many instances over many years, the Union has violated the Act both in the exact same manner as that perpetrated here, as well as in other ways. It has demonstrated not just a proclivity to disregard the Act, but an absolute commitment to doing so, despite all previous attempts to impress upon it Union the need to comply with the Act. Under these circumstances, the Board's exercise of its discretion to issue a broad remedial order was fully warranted.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board

April 2008

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	
	*	No. 07-4764
and	*	
	*	Board No.
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98	*	04-CB-09713
	*	
	*	
Respondent	*	

COMBINED CERTIFICATES

As required under the Federal Rules of Appellate Procedure, combined with Local Rules 25, 28, and 32, Board counsel makes the following certifications:

COMPLIANCE WITH TYPE-VOLUME REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its brief contains 5,684 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the .pdf file containing a copy of the Board's brief that was sent by e-mail to the Court is identical to the hard copy of the Board's brief filed with the Court and served on respondent, and were scanned for viruses using Symantec Antivirus Corporate Edition, program version

10.0.2.2000 (4/08/2008 rev. 5), and according to that program, were free of viruses.

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Dated at Washington, D.C.
this 10th day of April, 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

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This 10th day of April, 2008